UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JEFFREY DUANE MOSES,

Petitioner(s),

v.

ALICE PAYNE,

Respondent(s).

NO. C06-1105P

ORDER ADOPTING REPORT & RECOMMENDATION

The above-entitled Court, having received and reviewed:

1. Report and Recommendation (Dkt. No. 22)

2. Amended Objections to Report and Recommendation (Dkt. No. 25)

and all exhibits and declarations attached thereto, makes the following ruling:

IT IS HEREBY ORDERED that the Report and Recommendation is hereby ADOPTED; Petitioner's habeas petition is DENIED, and this matter is DISMISSED.

Background

The factual and procedural history of this case is described in detail in the Report and Recommendation ("R&R"), at 1 - 6, and the Court will not repeat it here. Unless otherwise noted, all citations hereafter are to the Administrative Record (AR).

In 2003, Petitioner was convicted of second-degree murder of his wife Jennifer Moses and unlawful first-degree firearm possession and received an exceptional sentence of 420 months. (Dkt. 10, Ex. 1.) The Washington Court of Appeals affirmed the conviction, but reversed the exceptional sentence and remanded for re-sentencing. (Id., Ex. 3.) In September 2006, the trial court re-sentenced Petitioner to 335 months. (Dkt. 12, Ex. 1.) Petitioner petitioned for review of the Court of

Appeals ruling, and the Washington Supreme Court denied the petition for review without comment. (Id., Ex. 5.)

Discussion

Petitioner's habeas petition raises three grounds for relief:

1. Denial of his Sixth Amendment right to confrontation by the admission of testimonial hearsay.

2. Denial of his Sixth and Fourteenth Amendment rights by exclusion of evidence supporting Petitioner's suicide theory of defense.

3. Denial of his Sixth Amendment right to jury trial by admission of opinion testimony on the issue of guilt.

1. Sixth Amendment Right to Confront Witnesses

Evidence of a previous domestic violence incident was admitted at trial. An emergency room doctor and social worker who saw the deceased at the hospital in November 2001 testified that Jennifer Moses stated that Petitioner hit and/or kicked her in the face. (See Dkt. 10, Ex. 6 at 15 and 64-65.) The social worker also testified that Petitioner's younger son stated that Petitioner kicked Jennifer Moses in the head and that they regularly argued. (Id. at 66-67.) Petitioner argues this evidence constituted impermissible testimonial hearsay because Jennifer had every reason to expect the doctor and social worker would be called as witnesses to testify at trial on charges arising from the incident. At issue is whether the admission of this testimonial hearsay denied Petitioner the Sixth Amendment right to confront witnesses against him in violation of Crawford v. Washington, 541 U.S. 36 (2004), and Davis v. Washington, ___ U.S. ___, 126 S.Ct. 2266 (2006).

Magistrate Judge Theiler's Report and Recommendation cited Bockting v. Bayer, 399 F.3d 1010, 1013-21 (9th Cir. 2005) for the proposition that Crawford applies retroactively to collateral proceedings. R&R at 12. However, this case has been overruled by the Supreme Court, in Wharton

v. Bockting, 127 S.Ct. 1173 (2007). Wharton held that Crawford is a new rule of criminal procedure that applies only to cases that are still on direct review. Id. at 1180. The Washington Supreme Court denied Petitioner's petition for review on May 31, 2006. As this case was still pending on direct review by the time Crawford was decided on March 8, 2004, Crawford still applies in Petitioner's case.

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. Amend. VI. Testimonial hearsay statements are barred under the Confrontation Clause unless the declarant is unavailable and the defendant had prior opportunity to cross-examine the declarant. Crawford, 541 U.S. at 68. One formulation of testimonial statements includes "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]'" Id. at 51-52 (omission in original) (quoted sources omitted). Federal courts have recognized that "Crawford at least suggests that the determinative factor in determining whether a declarant bears testimony is the declarant's awareness or expectation that his or her statements may later be used at a trial." United States v. Saget, 377 F.3d 223, 228 (2d Cir. 2004). In Davis, the Supreme Court found nontestimonial statements to be those "made . . . under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency[,]" while testimonial statements were those made under circumstances "objectively indicat[ing] that there is no such ongoing emergency [where] the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Davis, 126 S.Ct. at 2273-74 (emphasis added).

Applying the Crawford/Davis test, the Magistrate Judge correctly concluded the decedent's statements to Appleton were non-testimonial. As the Washington Court of Appeals noted, courts addressing Crawford's impact on statements admitted under the medical diagnosis and treatment

exception focus on the purpose of the declarant's encounter with the health care provider. (See Dkt. No. 10, Ex. 3 at 10). Dr. Appleton was not involved in the investigation of the assault and was not working in conjunction with police or governmental officials to develop testimony. Petitioner does not point to anything in the record indicating the deceased had any reason to believe her statements to Dr. Appleton would be used at a trial. Dr. Appleton's testimony is admissible under Crawford.

The decedent's statements to the social worker could be impermissible testimonial hearsay under Crawford. (See Dkt. No. 10, Ex. 3 at 13). However, even if her statements to the social worker are testimonial hearsay, the error was harmless. Relief may be granted on a federal habeas corpus petition only if the state court erred and the error had a "substantial and injurious effect or influence" in determining the jury's verdict. Brecht v. Abrahamson, 507 U.S. 619, 623, 637 (1993). This Court must ask whether "the error substantially influenced the jury's decision[.]" O'Neal v. McAninch, 513 U.S. 432, 436 (1995). Only if in "grave doubt" as to the effect of the error can the court rule that an error was harmful. Id. at 436-37.

Petitioner contends that introduction of this testimony was not harmless because the only other testimony identifying him as the November 2001 assailant was the 9-1-1 tape and the testimony of the deceased's stepfather. This is not the case. In addition to the 9-1-1 tape and the stepfather's testimony, there was further independent evidence tending to establish Petitioner as the assailant: the nature of the injuries, expert testimony that decedent's broken jaw was not the result of a slip and fall, the description of the responding officer concerning both the injuries and the state of the residence (including a phone ripped from the wall), and testimony of a history of arguments between Petitioner and his wife. (Dkt. 10, Ex. 3 at 14). None of this testimony violated Crawford. Furthermore, because the deceased's statement to the E.R. doctor is not testimonial, her statement to Dr. Appleton identifying Petitioner as her assailant is also admissible. In light of this cumulative evidence, any error

in the admission of Jennifer's statement to the social worker did not have a substantial and injurious effect on the jury's decision-making process.

Nor was the admission of the statements made by Petitioner's son to the social worker contrary to clearly established federal law. While the state court reasoned that this statement was admissible to show why the social worker contacted CPS, Petitioner argued that its admission violated the principle that evidence is not admissible to establish a non-hearsay purpose not relevant to any issue at trial. State v. Aaron, 57 Wn.App. 277, 280-81 (1990). The evidence, however, was relevant at trial.

Crawford clarified that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Crawford, 541 U.S. at 59 n.9. The record does not support Petitioner's argument concerning the relevancy of the CPS referral. Petitioner asserts that the prosecution opened the door to the CPS issue at trial, but this issue was a significant part of Petitioner's opening argument:

> That evening Jennifer went to the hospital with a broken jaw. CPS got involved; an added pressure. CPS got involved about the problems that they were told about from the hospital because of the alcohol involved, there were some barbiturates or drugs found in her system, and also they were concerned about domestic violence. CPS got involved and Jeff went into treatment.

(Id., Ex. 10 at 28-29.) Prior to the social worker's testimony, Petitioner had also on cross examination of Dr. Appleton briefly raised the issue of referring the children to CPS. (Dkt. No. 10, Ex. 11 at 53-54). The trial court correctly found that the "door was opened" by the defense (a finding agreed to by defense counsel; see Ex. 11 at 86), and allowed the social worker's testimony to explain the referral to CPS.

2. Sixth and Fourteenth Amendment Rights to Exclusion of Evidence

At trial, Petitioner argued that his wife had taken her own life. As his second ground for relief, Petitioner cites the trial court's exclusion of evidence regarding the defense's suicide theory

(specifically, the testimony of Dr. Wilson, autopsy photographs of the deceased and certain excerpts from decedent's diary) as a denial of his constitutional right to appear and defend at trial and to present evidence in his own behalf.

"Incorrect state court evidentiary rulings cannot serve as a basis for habeas relief unless federal constitutional rights are affected." Tinsley v. Borg, 895 F.2d 520, 530 (9th Cir. 1990) (quoting Lincoln v. Sunn, 807 F.2d 805, 816 (9th Cir. 1987)). The state court's decision to exclude certain evidence must be so prejudicial as to jeopardize the defendant's due process rights. Id. Magistrate Judge Theiler correctly relied on a five-part balancing test to determine whether exclusion of evidence reaches constitutional proportions and violates the Sixth Amendment or Due Process Clause. United States v. Duran, 41 F.3d 540, 545 (9th Cir. 1994). The five factors are:

> (1) the probative value of the excluded evidence on the central issue; (2) its reliability; (3) whether it is capable of evaluation by the trier of fact; (4) whether it is the sole evidence on the issue or merely cumulative; and (5) whether it constitutes a major part of the attempted defense.

The Court balances the importance of the evidence against the state interest in exclusion. Tinsley, 895 F.2d at 530.

Dr. Wilson's testimony concerning the decedent's suicidal tendencies was properly excluded. Four other medical providers who treated Jennifer had testified about her depression, her suicidal ideation, and her alcohol and drug addiction (Dkt. 10, Ex. 3 at 19); Dr. Wilson's testimony on this topic would have been cumulative. The issue of "risk of suicide" was within the common understanding of the jury, so the doctor's testimony was also of low probative value.

Dr. Wilson had not treated Jennifer Moses. (Dkt. No. 10, Ex. 11 at 104-08) and could not testify to a reasonable degree of medical certainty that she was suicidal the night of her death. (Id. at 139). Both of these facts impact the probative value of his evidence. He could only testify that she was in the category of people for whom the risk of suicide is greater than the average person, and state to a reasonable degree of medical certainty that she continued to suffer major depression at the time of

her death. (Id.) Petitioner elicited the same information regarding depression and suicide from other medical professionals. (Dkt. 10, Ex. 3 at 20). Because Dr. Wilson's testimony would have been both cumulative and of limited probative value, exclusion of his evidence does not rise to constitutional proportions under the five-factor balancing test.

Petitioner also wished to introduce an autopsy photograph showing the deceased's emaciated body as evidence of the extent of her eating disorder. (Dkt. No. 10, Ex. 3 at 20). But multiple witnesses had testified to his wife's 20-pound weight loss in the months prior to her death, Petitioner questioned his medical expert about her weight loss, and the trial court had also admitted other photographs showing decedent's upper torso. (Id.) The trial court properly held that the probative value of the photograph was minimal and did not outweigh its prejudicial effect. Petitioner offered no evidence that the autopsy photo would have differed from the other photographs or witness testimony. The photograph would have been merely cumulative and its exclusion does not reach constitutional proportions.

Excerpts from the deceased's private paper diary, although perhaps relevant, would also have been merely cumulative of other evidence. The trial court admitted numerous journal entries pertinent to Petitioner's suicide defense. (See Dkt. 10., Ex. 9 at 19: "We have had an extensive discussion of Ms. Moses' written journal. . . . I will note again what I did allow were her statements about depression, suicidal thoughts, and the like.") Petitioner's counsel used and emphasized these journal entries in closing arguments. (See Id., Ex. 15 at 67-70, 70-71). Excerpts from journals more than four months prior to death would not have been probative of the deceased's state of mind on the night she died. (Id., Ex. 3 at 21). The trial court also admitted relevant evidence related to Jennifer's depression and suicidal ideation for the entire year before her death. (Id., Ex. 3 at 21). For these reasons, Jennifer's private paper journal entries would have been merely cumulative, not probative, and their exclusion did not reach constitutional proportions.

3. Sixth Amendment Right to Jury Trial

As his third ground for relief, Petitioner asserts denial of his Sixth Amendment right to a jury trial based on the admission of opinion testimony as to guilt. See, e.g., United States v. Duncan, 42 F.3d 97, 101 (2d Cir. 1994). Petitioner challenges testimony from Dr. Richard Harruff, ballistics expert Evan Thompson, and social worker Tamara Muller on this basis.

Dr. Harruff testified to his opinion that the death was a homicide. Because Dr. Harruff relied on factors outside his area of expertise, Petitioner asserts, this testimony impermissibly invaded the province of the jury. As "areas outside of his expertise," Petitioner cites Dr. Harruff's review of portions of Jennifer's diary and statements made by Petitioner, and his testimony that he believed Mr. Moses was not straightforward after the death. Had Dr. Harruff only relied on objective factors, Petitioner argues, he could not have reached the conclusion he did . Petitioner notes Dr. Harruff's testimony that most suicide gunshots result in contact wounds (Dkt. No. 10, Ex. 16 at 18), and forensic pathologist Emmanuel Lacsina's testimony that a contact wound supported a conclusion of suicide. (Dkt. No. 10, Ex. 14 at 27).

Simply because another expert disagrees with Dr. Harruff's analysis does not demonstrate that Dr. Harruff relied on factors outside his area of expertise. Viewed in its entirety, this expert's testimony is neither inconsistent nor based on areas outside his expertise. Dr. Harruff stated that a gunshot wound to the back of the head is usually homicide, whether or not it is a contact wound. (Dkt. No. 10, Ex. 16 at 18). Dr. Harruff testified that he relied primarily on forensic or objective factors including the fact that it was a contact wound on a particular body location, that the orientation of the weapon was "sight basically up[,]" and that Mr. Thompson, the ballistics expert, indicated that a derringer trigger was difficult to pull. (Id. at 29-30.) Dr. Harruff was also careful to distinguish his testimony from the role of the jury and testified it was not his role to determine whether a death was a

murder. (Dkt. No. 10, Ex. 16 at 34-35). Dr. Harruff did not improperly render an opinion as to Petitioner's guilt.

Mr. Thompson, the ballistics expert, also did not improperly render an opinion as to Petitioner's guilt. It is true Mr. Thompson testified that most contact wounds are suicide and that suicide was possible in this case. (Dkt. No. 10, Ex. 17 at 17). It is not true, as Petitioner claims, that Mr. Thompson pointed to no explanatory theory in support of his conclusion or of any experience or training which would lead to his conclusion. While conceding the possibility of a self-inflicted wound, Thompson testified that the death was a homicide based on factors such as the "muzzle stamp, the location and the sight orientation," the strength necessary to pull the trigger, and based on his experience, training, and analysis of photographs and the weapon. (Dkt. 10, Ex. 17 at 19-22). This expert's opinion was properly rendered and admitted.

Finally, Ms. Muller's testimony that a domestic violence victim is most likely to be killed when she leaves home was not an improper opinion as to Petitioner's guilt. Ms. Muller, rather than making an opinion particular to Petitioner, merely responded to a general question regarding her experience giving advice to victims of domestic violence by stating that she "very seldom" told victims of domestic violence to leave the situation immediately, because they are most likely to be killed when they leave. (Dkt. No. 10, Ex. 11 at 83). This was within her expertise and not a comment on Petitioner's guilt or innocence.

Conclusion

Because neither decedent's statements to the emergency room doctor nor Petitioner's son's statements to the social worker were testimonial, and the admission of the deceased's statements to the social work was at most harmless error, Petitioner's Sixth Amendment right to confrontation was not violated on Crawford grounds. Petitioner's Sixth and Fourteenth Amendment rights to appear and defend at trial, and to compulsory process and due process of law were not violated by the trial court's

exclusion of Dr. Wilson's testimony, Jennifer's autopsy photograph, and portions of Jennifer's private paper diary. Even if the exclusion of this evidence was in error, the error did not reach constitutional proportions given the cumulative nature and low probative value of the evidence. Petitioner's Sixth Amendment right to a jury trial was not violated by the admission of opinion testimony from Dr. Harruff, Mr. Thompson, and Ms. Muller.

Magistrate Judge Theiler's Report and Recommendation is hereby ADOPTED, the petition DENIED and the case DISMISSED with prejudice.

The clerk is directed to provide copies of this order to all counsel of record.

Dated: April __10_, 2007

Marsha J. Pechman
U.S. District Judge